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Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons

A. Introduction and general observations

1. The Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund (UNICEF) and the International Organization for Migration (IOM) wish, at the outset, to express their support for the work of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. The Office, UNICEF and IOM are greatly encouraged by the fact that Member States have agreed to develop specific instruments in relation to the smuggling of migrants (revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime (A/AC.254/4/Add.1/Rev.4)), "Migrant Protocol", and the trafficking in persons (revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (A/AC.254/4/Add.3/Rev.5)), the "Trafficking Protocol". The present note raises a number of outstanding concerns in relation to the two Protocols. The Office, UNICEF and IOM are particularly eager to assist States in ensuring that those instruments do not conflict with or otherwise undermine existing international legal standards.

2. One issue that the Office, UNICEF and IOM would like to raise at the outset is the question of the relationship between the two draft Protocols. While work has been done on identifying common provisions, little or no discussion has taken place on the potential for conflict between them. The distinction that has been made between trafficked persons and smuggled migrants is evidently a useful one. However, the Office, UNICEF and IOM are aware that such distinctions are less clear on the ground, where there is considerable movement and overlapping between the two categories. During the informal consultations devoted to consideration of the draft Protocols, it was determined that trafficked persons

are to be granted protections additional to those accorded to smuggled migrants. However, there is little guidance in either instrument regarding how the identification process is to be made and by whom. The informal consultations may wish to consider the implications of the fact that, according to the current drafts, identifying an individual as a trafficked person carries different responsibilities for the State Party concerned than is the case when that same person is identified as a smuggled migrant. The informal consultations may also wish to consider the possible consequences of a State ratifying one but not both instruments.

B. Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

1. Purpose of the Protocol

3. The Office, UNICEF and IOM fully support the view expressed during the informal consultations that the Trafficking Protocol is to have two main purposes: to contribute to the elimination of trafficking through transnational organized crime; and to extend support and protection to victims of trafficking. In the spirit of that commitment, it is proposed that both purposes be explicitly set out in article 1 of the Protocol.

2. Definition of trafficking

4. The Office, UNICEF and IOM support a broad and comprehensive definition of trafficking and advocate a revised version of the current option 1 of article 2, which would make specific reference to trafficking as the recruitment, transportation, transfer or harbouring or receipt of any person for any purpose or in any form, including the recruitment, transportation, transfer or harbouring or receipt of any person by the threat or use of force or by abduction, fraud, deception, coercion or abuse of power for the purposes of slavery, forced labour (including bonded labour or debt bondage) and servitude. The term "servitude", when used in this context, should be understood to include practices that have been defined elsewhere as "contemporary forms of slavery", such as forced prostitution. As noted in the previous submission of the United Nations High Commissioner for Human Rights (A/AC.254/16, para. 12), the references to slavery, forced labour, bonded labour and servitude are consistent with existing international law (see, for example, article 8 of the International Covenant on Civil and Political Rights (see General Assembly resolution 2200 A (XXI), annex)).

3. Definition of trafficking in children

5. The Office, UNICEF and IOM support a separate definition of trafficking in children. That definition should include reference to the recruitment, transportation, transfer or harbouring or receipt of any child or the giving of any payment or benefits to achieve the consent of a person having control over a child for the purposes specified in paragraph 4 above, as well as for the purpose of using, procuring or offering a child for sexual exploitation, including the production of pornography, or for pornographic services. In addition, in the context of the Protocol and in accordance with the Convention on the Rights of the Child (resolution 44/25, annex), "child" should refer to any person under the age of 18 years. In relation to the terms "child prostitution" and "pornography", reference could usefully be made to the relevant provisions of the Convention concerning

the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182), adopted by the General Conference of the International Labour Organization on 17 June 1999.

4. Protecting the rights and interests of trafficked children

6. The Protocol should include an explicit acknowledgement of the fact that children have special rights under international law, and in particular in the light of the Convention on the Rights of the Child; that child victims of trafficking have special needs that must be recognized and met by States Parties; that States are obliged to take measures to prevent trafficking of children; and that in dealing with child victims of trafficking, the best interests of the child (including the specific right to physical and psychological recovery and social integration) are to be at all times paramount. Also important is clear recognition of the need to fight the impunity of those responsible for the trafficking, while at the same time ensuring that the child is not criminalized in any way. In that context, it should be noted that the overwhelming majority of States are already under such legal obligations through their ratification of the Convention on the Rights of the Child. Existing international law would also appear to require States to ensure, *inter alia*, that assistance and protection of child victims of trafficking is not made discretionary or otherwise dependent on the decision of national authorities. In accordance with article 2 of the Convention, child victims of trafficking are entitled to the same protection as nationals of the receiving State in all matters, including those relating to protection of their privacy and physical and moral integrity.

5. Protection of trafficked persons

7. The Office, UNICEF and IOM note that the key provisions of article 4 (assistance for and protection of victims of trafficking in persons) remain qualified by the term "in appropriate cases". It is submitted that such a qualification is unnecessarily restrictive and not in accordance with international human rights law, which clearly provides that victims of human rights violations such as trafficking should be provided with access to adequate and appropriate remedies. At a minimum, States Parties should be obliged to provide information to trafficking victims on the possibility of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and to render assistance to such victims, giving particular attention to the special needs of children, to enable them to obtain the remedies to which they are entitled.

6. Status and repatriation

8. The attention of the informal consultations is drawn to the previous submission of the Office, in which the High Commissioner for Human Rights expressed the view that "safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons. A failure to include provision for safe and (to the extent possible) voluntary return would amount to little more than an endorsement of the forced deportation and repatriation of victims of trafficking. When trafficking occurs in the context of organized crime, such an endorsement presents an unacceptable safety risk to victims" (A/AC.254/16, para. 20).

9. The Office, UNICEF and IOM urge the informal consultations to ensure, at a very minimum, that the identification of an individual as a trafficked person is sufficient to ensure that immediate expulsion against the will of the victim does not occur, and that the protection and assistance provisions of the Protocol become immediately applicable.

Special attention must be given to the situation of children, from protecting and ensuring all their rights, such as the rights to education and health care, to locating their families, as well as ensuring that sensitive and appropriate measures are taken to reconcile the children with their families.

7. Border controls

10. The current draft provisions on border controls contained in article 8 appear somewhat at odds with the stated purposes of the Trafficking Protocol, and call into question the accepted distinction between trafficked persons and smuggled migrants. The Office, UNICEF and IOM agree with the comments made by several delegations at the sixth session of the Ad Hoc Committee that such provisions could operate to restrain the liberty of movement of the persons who are subject to protection under the Protocol. Given that the majority of trafficked persons are women and girls, the imposition of such restrictions would be, prima facie, discriminatory. It is clear that the strengthening of border controls is an important aspect of preventing trafficking. However, emphasis should be placed, in article 8, on measures to assist border authorities in identifying and protecting victims, as well as intercepting traffickers.

11. In addition, while States have a legitimate interest in strengthening border controls to detect and prevent trafficking, the Office, UNICEF and IOM are concerned about the need to ensure that the measures do not impinge upon the human rights of individuals as set out in the major international instruments, including the International Covenant on Civil and Political Rights, the Convention relating to the Status of Refugees of 1951[1] and the Convention on the Rights of the Child. It is especially important to ensure that border measures do not limit the right of individuals to seek and enjoy in other countries asylum from persecution as provided for under the Convention relating to the Status of Refugees. In particular, provisions of the draft Protocol should not undermine the fundamental principle of *non-refoulement* (see para. 21 below).

8. Prevention of trafficking in persons

12. The Office, UNICEF and IOM support the proposal for a simplified version of the protection provisions currently set out in the draft Protocol in order to ensure clarity of obligation and flexibility in dealing with new forms of trafficking as and when they arise. However, it is important that the proposed revision should be based on an understanding and acceptance of the root causes of trafficking, including economic factors such as poverty, unemployment and indebtedness; social and cultural factors such as violence against women and girls and gender discrimination in the family and the community and by the State; political and legal factors such as a lack of appropriate legislation and corruption in the public sector; and international factors such as the growing feminization of labour migration, on the one hand, and increasingly restrictive immigration policies of recipient countries, on the other. While it is clearly beyond the scope of the Protocol to address those additional issues in any depth, reference could usefully be made to steps that could be taken by States Parties to address the root causes of trafficking. Such steps could include legal measures as well as the social and economic initiatives already referred to in article 10, paragraph 2, of the draft Protocol.

13. It is also relevant to note that measures taken at the national level to prevent trafficking have been used in some situations to discriminate against women and other groups in a manner that amounts to a denial of their basic right to leave a country and to migrate legally. The inclusion of a general non-discrimination clause as suggested in the

following paragraph would go a considerable way towards ensuring that such discrimination does not become an unintended side-effect of the Protocol.

9. Need for a non-discrimination clause

14. As noted in an earlier submission by the United Nations High Commissioner for Human Rights (A/AC.254/16, para. 15), the principle of non-discrimination is a fundamental rule of international law and one of particular relevance to the situation and vulnerabilities of irregular or illegal migrants. The Office, UNICEF and IOM urge the informal consultations to include a broad non-discrimination provision such as that contained in the Rome Statute of the International Criminal Court (A/CONF.183/9, article 21, para. 3).

C. Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime

1. Rights of migrants

15. The Office, UNICEF and IOM recognize that the primary objective of the Migrant Protocol is to address the crime of migrant smuggling. However, as was acknowledged by a number of delegations at the sixth session, there is a clear need to ensure that the individuals falling victim to such practices are protected. The vulnerability of migrants, in particular irregular migrants, as a result of their precarious situation in society often leads to violations of their most basic human rights. The draft Protocol focuses on migrants who are or have been the victims of criminal exploitation in their countries of origin, in transit countries and/or in countries of reception. That status renders such persons even more vulnerable to further exploitation. It is imperative, therefore, that the Protocol should preserve and seek to uphold the fundamental human rights to which all persons, including smuggled migrants, are entitled. Respect for such rights does not, however, prejudice or otherwise restrict the sovereign right of all States to decide who should or should not enter their territories.

2. Need to include a protection provision in the Migrant Protocol

16. The Office, UNICEF and IOM welcome the explicit references to obligations of States Parties under the 1951 Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees of 1967[2] as safeguards aimed at ensuring that the adoption of the Migrant Protocol does not jeopardize the obligations of States Parties to the 1951 Convention or impinge on the ability of asylum seekers to secure protection from persecution.

17. The Office, UNICEF and IOM urge that the above-mentioned safeguards be maintained and, where appropriate, further strengthened. The inclusion of a specific reference to international human rights law in the Migrant Protocol is considered especially important. It is recommended that a saving clause such as that contained in the Trafficking Protocol be inserted, with reference being made to the rights, obligations and responsibilities of States and individuals under international law, including applicable international humanitarian law and international human rights law and, in particular, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

18. In this context, it is essential to acknowledge that increasing numbers of asylum seekers, including those with genuine claims to refugee status, are being transported by means covered in the draft Migrant Protocol. The principle of *non-refoulement*, which is the core of international refugee protection, and which is recognized as a norm of customary international law, must be explicitly preserved in the Migrant Protocol. The Office, UNICEF and IOM strongly advocate the inclusion of a provision to the effect that illegality of entrance into a State will not adversely affect a person's claim for asylum. Further, in order to make such a provision effective, signatories should be required to ensure that smuggled migrants are given full opportunity (including through the provision of adequate information) to make a claim for asylum or to present any other justification for remaining in the country, and that such claims are considered on a case-by-case basis. Such a provision could be inserted as a safeguard clause or, if more appropriate, added to the saving clause.

3. Need to include specific protection of smuggled children

19. As in the case of the Trafficking Protocol, the Office, UNICEF and IOM are of the view that the Migrant Protocol should include an explicit acknowledgement of the fact that children have special rights under international law; that child victims of smuggling have special needs and are entitled to special protection; and that, in dealing with child victims of smuggling, the best interests of the child are to be at all times paramount. In accordance with article 2 of the Convention on the Rights of the Child, child victims of smuggling are entitled to the same protection as nationals of the receiving State in all matters, including those relating to protection of their privacy and physical and moral integrity.

4. Issue of return

20. To ensure comprehensiveness of the instrument and its compatibility with existing standards, the Office, UNICEF and IOM advocate the inclusion of a provision on return. International law clearly recognizes the right of all persons to return to their country of origin. States should abide by their obligations to accept the return of their nationals and to facilitate such return. Special consideration needs to be given to the situation of children, including those in situations of return for purposes of family reunification in accordance with the Convention on the Rights of the Child, in particular articles 10 and 22 thereof. However, an article on return should be accompanied by strong and effective safeguard or saving clauses ensuring the right to international protection against *refoulement* and guaranteeing the basic human rights of the migrants involved. In light of its experience in return activities undertaken on behalf of States, IOM suggests that States should be obliged to issue travel documents at the request of another State Party or a relevant international organization (see article 15, para. 3, of the draft Protocol (A/AC.254/4/Add.1/Rev.4)).

5. Prevention of migrant smuggling

21. The strengthening of border controls and other measures foreseen in the draft Protocol to prevent the smuggling of migrants should be implemented in such a manner that they will not undermine the rights of individuals to seek asylum or put refugees and asylum seekers at risk of *refoulement*.

22. In relation to the training of immigration and other relevant officials, the Office, UNICEF and IOM recommend that the relevant draft article include a specific reference to training in international human rights law, in particular international refugee law, the

rights of women and children's rights. In view of the potential conflict in application of the Migrant and Trafficking Protocols, the Office, UNICEF and IOM further suggest that specific reference be made to training, in order to ensure proper and timely identification of trafficked persons and their treatment and care as victims rather than as criminals.

Notes

[1] *Human rights: a compilation of international instruments*, vol. I, second part (United Nations publication, Sales No. E.94.XIV.1 (Vol. I, Part 2)), sect. O.

[2] Ibid.